EME COURT, U. S. 71-1090.

IN THE

Supreme Court of the United States

HERBERT W. CABBLER

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR WRIT OF CERTIORARI

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ROANOKE PRINTING CO., INC., ROANOKE, VA.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:-

The Petitioner, Herbert W. Cabbler, petitions for a writ of certiorari to review five judgments of the Supreme Court of Virginia as follows:

I. REFERENCE TO REPORTS OF OPINIONS

An opinion was delivered by the Supreme Court of Virginia on November 29, 1971 and is appended to this petition. The opinion will appear in Volume 212 of the official Virginia Reports and also will appear in the Southeastern Reports published by West Publishing

Company; but at the date of drafting this petition, the precise reporter books and page numbers are unknown.

II. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

Jurisdiction is invoked on the grounds the Petitioner was jointly convicted of five separate charges simultaneously made and tried by a State court of the crime of larceny by receiving stolen goods knowing them to be stolen, based on evidence of such stolen goods obtained by an illegal search and seizure of the Petitioner's automobile in violation of Section 1 of Amendment XIV of the Constitution of the United States of America; and

1. The five judgments sought to be reviewed were made and entered by the Supreme Court of Virginia on November 29, 1971 and they affirmed five judgments of the Hustings Court of the City of Roanoke entered on February 21, 1970 respectively convicting the Petitioner of larceny by receiving stolen goods knowing them to be stolen; and

2. Five orders of the Supreme Court of Virginia were entered on December 8, 1971 staying its respective five judgments on November 29, 1971 affirming the convictions as aforesaid in order to permit the Petitioner to have reasonable time and opportunity to apply to this Court for a petition for a writ of certiorari to review the aforesaid five judgments of that court. The stays are effective until February 26, 1972; and, if by that time the case has been docketed in this Court, thereafter until final determination by this Court. There has been no application for a rehearing to the Supreme Court of Virginia; but its five judgments on November 29, 1971 pursuant to its written opinion on November 29, 1971 con-

sists of a final adjudication by the highest court of the Commonwealth of Virginia concerning the subject matter in controversy; and

3. The statutory provision believed to confer jurisdiction on this Court to review the final judgments in question by a writ of certiorari is 28 U. S. C. §1257(3).

III. QUESTIONS PRESENTED

The sole question presented for review by this petition for a writ of certiorari is whether stolen goods are admissible as evidence in a state criminal trial charging larceny of the goods when the goods were taken by police officers from the locked trunk of the automobile of the accused, without probable cause to believe that the trunk of the car contained stolen goods, pursuant to an alleged inventory of the valuable contents in the automobile taken by the police officers to protect it and prevent it from being "stranded" when the accused was arrested on an extraneous matter, even though the accused was not in his car at the time of his arrest and his car was parked on private property.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision which this case involves is the second sentence of Amendment XIV, Section 1 of the Constitution of the United States and is as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By judicial decision, the aforesaid due process clause of the Fourteenth Amendment makes Amendment IV of the Constitution of the United States applicable to state criminal proceedings, which is as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized."

V. STATEMENT OF THE CASE

The following is a concise statement of the case confined to the question presented. In referring to the record, there were six indictments, but because the Petitioner was acquitted on one indictment, there are only five records. All proceedings concerning the five records were held jointly so that there is only one transcript of the pretrial and trial proceedings. Because the records and transcript were returned to the trial after the final judgments by the Supreme Court of Virginia on November 29, 1971 before the orders of stay were entered on December 8, 1971, the Clerk of the Supreme Court of Virginia insists the trial court is the court possessed of the records. These records, however, contain the orders of the Supreme Court of Virginia applicable to them except there was only one copy of the written opinion attached to all five final judgments certified to the trial court; and the written opinion is found in record number 38115 of the trial court. Page references to a record are preceded by the letter "R" followed by the trial court docket number followed by a hyphen and the particular page number. The five records of the trial court are 38115,

38116, 38117, 38118 and 38119. In the Supreme Court of Virginia, these records were respectively record number 7744, 7745, 7746, 7747 and 7748. Page references to the single transcript applicable to all five records are preceded by the letter "T". The Petitioner is referred to as "Cabbler" and the Respondent as "Virginia".

A. PROCEDURE RAISING FEDERAL QUESTION

Without prior preliminary hearing (T. 10) Cabbler was simultaneously indicted for one statutory burglary (on which he was acquitted and there is no record), three grand larcenies and two petty larcenies by a grand jury of the Hustings Court of the City of Roanoke on November 3, 1969 (R. 38115-1; R. 38116-1; R. 38117-1; R. 38118-1; and R. 38119-1). At a pretrial hearing on November 26, 1969, Cabbler, after receiving information that all six of the charges were based on his unexplained possession of recently stolen property found in the trunk of his automobile on September 2, 1969, moved to suppress the evidence of these goods (T-13) which were contained on a list to be supplied to him (T. 6 and 7). After hearing testimony on the motion to suppress (T. 35-164), the trial court overruled this motion (T. 177) and Cabbler excepted (T. 177). The specific reason for the motion to suppress was the goods were obtained from the locked trunk of Cabbler's automobile by a lawless search and seizure in violation of the Fourteenth Amendment. Virginia insisted the police can inventory an automobile taken in custody as a public service for the protection of the person arrested, and if such a routine inventory results in the discovery of stolen goods, then such goods are admissible as evidence even though there was no probable cause to search the car for stolen goods.

The trial court emphasized the need for guidelines in overruling the motion by stating:

> "All right, I think it is a real close point and I think it is something I am inclined to agree with the Commonwealth Attorney that the Supreme Court of Appeals ought to pass on it. Set some guidelines on it." (T. 177)

A consolidated trial by jury on the six indictments began on February 19, 1970 and continued through February 20 and February 21, 1970. The stolen goods were introduced into evidence at the trial by jury, and the same federal question of unlawful search and seizure was alleged as error, and the error was preserved by exceptions (T. 200; T. 265). Cabbler was found not guilty of the burglary indictment. On the five larceny indictments, he was found not guilty of simple larceny, but respectively found guilty under each indictment of larceny by knowingly receiving the stolen goods found in the locked trunk of his car on September 2, 1969. The total punishment for all five verdicts was confinement in the penitentiary for eleven years and fines of $1,000.00. The judgments of convictions were entered on the same day of February 21, 1970 and Cabbler assigned numerous errors of which the first was as follows:

> "The denial by the trial court of the pretrial motions by Cabbler to suppress as evidence all the articles found in the trunk of Cabbler's car on September 2, 1969 and the rulings by the trial court permitting the introduction of such articles into evidence at the consolidated trial of the five indictments when such articles were obtained from the locked trunk of Cabbler's car on September 2, 1969 by police officers making an illegal search and seizure and therefore in violation of Amendment

IV of the Constitution of the United States made applicable to this proceeding by Amendment XIV of said Constitution and also in violation of Section 10 of the Constitution of Virginia and also in violation of Virginia Code §19.1-88." (R. 38115-52)

There were other assignments of error not material to the federal question.

On June 15, 1971, the Supreme Court of Virginia granted a writ of error to each of the five judgments of conviction. That court consolidated the cases for the purpose of briefs, oral arguments and the opinion which was rendered on November 29, 1971. The written opinion contained three separate parts following the three major points of alleged error by the trial court as argued in the same order by the printed briefs respectively of Cabbler and the Commonwealth of Virginia. The first part of the written decision involves the precise question of the federal constitutionality of the search and seizure sought to be reviewed.

B. STATEMENT OF FACTS CONCERNING FEDERAL QUESTION

In the early morning of September 2, 1969, at approximately 1:20 o'clock a. m. (T. 35; fifth answer), Cabbler parked his Cadillac automobile on a private driveway (T. 65; T. 197; T. 255) in front of the Community Hospital of Roanoke Valley and proceeded into the emergency treatment room at the hospital (T. 38). Cabbler was arrested inside of the hospital by a Roanoke City police sergeant, R. C. Reynolds, upon information he obtained on the telephone that a warrant was being issued for Cabbler for feloniously shooting in an occupied dwelling (T. 40 and 41). At the time of the arrest in

the emergency room, Cabbler was searched and the keys to his automobile parked outside of the hospital were taken from him by Sergeant Reynolds (T. 55; T. 151; T. 153; T. 162; T. 213; and T. 254). Notwithstanding the fact that Cabbler was suffering from a gunshot wound, he was taken from the hospital and placed in a police car (T. 41 and 42). It was beginning to rain and Cabbler asked one of the police officers to roll up the windows of his automobile (T. 42); but before the windows were rolled up Cabbler was placed in the police car (T. 46). When rolling up the windows and even beforehand, police officers observed a pistol on the back seat of the car which Cabbler denied was his (T. 47). The pistol was taken by the officers at that time but that search is not herein involved. Cabbler was taken by Sergeant Reynolds to police headquarters in a police car (T. 48). Then Sergeant Reynolds had police Sergeant J. O. Jordan transport him (Sergeant Reynolds) back to the hospital, where he, Sergeant Reynolds, got into the Cadillac automobile and drove it to the police station (T. 48; T. 255 and 256). Cabbler did not ask Sergeant Reynolds to go back to his car and bring it to the police station, but Sergeant Reynolds did this on his own as police department policy (T. 256; second and third answers). According to the police officers, Cabbler did not protest when told his car would be taken into custody for safe-keeping until he was released from custody. According to Cabbler, he testified he thought that he would be in the hospital all night because of the gunshot wound (T. 155; first answer); that he called his restaurant and asked the counter-girl to send one of his employees to pick up the car (T. 150); and that he attempted to tell the police officers someone would pick up his car (T. 156; T. 163; first answer). In any event, it is quite obvious the police officers would

not follow Cabbler's wishes after having arrested him when bleeding profusely from a gunshot wound without permitting the treatment for such wound to continue.

The reason Sergeant Reynolds went back to the hospital and drove Cabbler's car to the police station was to keep the car safe until Cabbler was released from jail (T. 47 and 48; T. 67 and 68; T. 202; T. 206). The established police department policy is to remove all valuables from an automobile taken into custody and return them to the owner when he is released on bail (T. 210; fourth answer). *The arresting police officer would not have left the car locked and unattended even if he had known Cabbler had someone coming to the hospital to pick up the car. (T. 77).* Particularly Sergeant Reynolds said that, if he had arrested Cabbler and not taken Cabbler's car into custody, he would have been responsible for all property in the car at that time (T. 73; first answer)

The car was taken by Sergeant Reynolds to police headquarters; and when he opened the locked trunk of the car with the key found on Cabbler's person at the time of Cabbler's arrest, Sergeant Reynolds observed the goods in the trunk were so numerous that the property room would not hold them. Accordingly he drove the car across the street to an annex building and removed the goods, placing them on a pool table until a key to another property room became available the next morning. While the express purpose of taking the property from the locked trunk of the car was to keep it safe until Cabbler was let to bail (T. 50; last answer), Cabbler was released on bail and picked up his car an hour or two after being arrested (T. 51; last answer; T. 257; second answer) long before the property taken from the trunk

of his car for safe-keeping was removed from the pool table to a safe property room.

The property taken from the locked trunk of Cabbler's car and placed on the pool table consisted of stolen goods; and the judgments sought to be reviewed are convictions of Cabbler for receiving these stolen goods knowing them to be stolen.

While there is no written regulation, it has been the long-standing custom of the Roanoke City Police Department to take into custody the automobile of a person arrested and remove from the automobile and inventory the valuable goods in the automobile taken into custody. It is not necessary that the person arrested be in his automobile at the time of his arrest; but it is only necessary he be away from home. If a man is arrested for illegal parking, his car is not taken or his property inventoried (T. 58; line fifteen and sixteen). If he is arrested at his home, his car is not taken (T. 58). It was conceded that there was no written process to seize the car, no search warrant at any time (T. 199), and no probable cause to believe stolen goods were in the locked trunk of the car (T. 69), and no process to keep the property after the car was returned to Cabbler (T. 7). On one previous occasion, when an owner of a car complained his goods were not returned to him when he and the car were released from custody, a former superintendent of police issued a written regulation requiring the police inventory the contents of motor vehicles taken into custody to prevent the police and other City of Roanoke employees from being subjected to allegations for theft (T. 130-134). There has never been a written regulation concerning *when* a policeman will assume custody of an automobile of a person he arrests, and the

unwritten custom is very inflexible when a person is not inside his car at the time of the arrest. This is emphasized by testimony of Captain Henry R. Kiser of the Roanoke Police Department as follows: (T. 97 and 98);

"Q. So you say that when you arrest someone in a car that is in his possession or nearby you take the car as well as the man?

A. Yes, sir.

Q. Or close by when you arrest him?

A. Yes, sir.

Q. I assume if the man is outside in his yard and on his driveway is parked his car and he has been charged with murder of his wife, you take his car?

A. No, sir.

Q. You don't do that?

A. No, sir.

Q. So there are various exceptions to your customs?

A. They are flexible, yes, sir.

Q. Very flexible. Then the officer decides then and there whether you shall take such motor vehicle into possession. Isn't that true?

A. That's true."

There was a side conflict as to whether Cabbler's car was parked in violation of the hospital's regulations. Cabbler testified that the car was parked in a fifteen minute zone (T. 149). The arresting officer stated the hospital regulations marked the space where the car was parked as a "no parking" zone (T. 65) and Cabbler's car partially blocked the emergency room driveway even though an ambulance could drive by to the emergency room (T. 82). The conflict in the evidence is immaterial to the federal question here presented because Virginia admitted in the argument before the Supreme Court of Virginia that there was no police authority to remove the automobile from private property even if it had been partially blocking the emergency room driveway or otherwise parked in violation of hospital regulations.

VI. ARGUMENT

The writ of certiorari should be granted because the appended decision of the Supreme Court of Virginia decides a federal question of substance in a way not in accord with the applicable decisions of this Court.

It is elementary that if the goods were obtained from the locked trunk of Cabbler's car by an illegal search and seizure in contradiction to the Fourth Amendment, then pursuant to the Due Process Clause of the Fourteenth Amendment the goods were not admissible as evidence. *Map* v. *Ohio*, 367 U. S. 463 (1951). Generally the Fourth Amendment prohibits a search without a warrant as being unreasonable; but there are exceptions when a warrantless search is considered reasonable such as when the search is incident to a valid arrest.

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However, after Cabbler was arrested at a hospital and his car had been taken to the police station, the opening of the locked trunk of the automobile was not a search incident to the arrest. *Preston* v. *United States,* 376 U. S. 364 (1964). There is, however, an alternate ground justifying a warrantless search of a car after it is taken to the police station when the police have probable cause to believe the car contains evidence of guilt of the particular crime for which the person is arrested. *Chambers* v. *Maroney,* 399 U. S. 42 (1970). In the case herein involved, Cabbler's car was not searched pursuant to his arrest or pursuant to probable cause. The justification for the search as argued by Virginia in the trial court and in the Supreme Court of Virginia is expressed in the appended opinion of the Supreme Court of Virginia as follows:

> "The Attorney General does not attempt to justify discovery of the stolen goods as a search incident to a lawful arrest. He says that the action of the police in removing Cabbler's car from the driveway of the hospital to a place of safe-keeping and the removal and inventory of the contents of the car were reasonable acts performed under procedures established by the Roanoke Police Department for the protection of property in possession of a person arrested away from his place of residence." (See appendix at pages 7, 8.)

Apparently the authority for such argument is based on *Harris* v. *United States,* 390 U. S. 234 (1968). There the investigating officer legally *impounded* an automobile as evidence; and when not engaged in an inventory of the car, a policeman observed the incriminating automobile registration card in open view. Here the police officer had not impounded Cabbler's car, but returned it

to Cabbler as soon as he was let to bail several hours later. The police were engaged in an inventory of the contents of the car and the incriminating evidence was not in open view but in the locked trunk of the car. Consequently, *Harris* does not authorize the warrantless search here involved.

Harris v. *United States, supra,* follows the doctrine announced by the Court in *Cooper* v. *California,* 368 U. S. 58 (1967). There California police officers seized an automobile when they arrested Cooper in it pursuant to the California Health and Safety Code which required the vehicle "to be held as evidence until a forfeiture had been declared, or a release ordered". The decision distinguished *Preston* v. *United States, supra,* on the grounds that in *Preston* the vehicle had not been seized for forfeiture but was merely in custody until Preston was released. Once the police had judicial authorization to seize the car, they did not need a second authorization to search it. In the case here involved, there was no judicial or statutory authorization to seize the car.

The difference between a legal impoundment and the removal of the vehicle for the convenience of the person arrested is clearly made in *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216 (1968). That case involved a contempt conviction against Dyke and others on circumstantial evidence based on finding an air rifle in Dyke's car driven by Ed McKinney. The car was stopped for a traffic violation and the occupants were taken to jail. While they were being booked, the car was searched when parked outside the jailhouse and the air rifle was found. This Court held the search and seizure was unconstitutional and made the following important distinction hereby asserted as follows:

"The search in question here is not saved by *Cooper* v. *State of California* . . . which upheld a warrantless search of a car impounded 'as evidence' pursuant to a state statute. The police there were required to seize the car and keep it until forfeiture proceedings could be completed. In those circumstances, said the Court, '(i)t would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their protection, to search it.' In the instant case there is no indication that the police had purported to impound or hold the car, that they were authorized by any state law to do so, or that their search of the car was intended to implement the purpose of such custody. Here the police seemed to have parked the car near the courthouse merely as a convenience to the owner, and to have been willing for some friend or relative of McKinney (or McKinney himself if he were soon released from custody) to drive it away. The reasons that made the warrantless search in *Cooper* reasonable thus do not apply to the search here. The Court discussed in *Cooper* . . . the reasons why that case was distinguishable from Preston. The case before us is like *Preston* and unlike *Cooper* according to each of the distinguishing tests set forth in the *Cooper* opinion." 391 U. S. at pages 220 and 221.

Here it was reiterated by the testimony time and time again that the purpose of taking Cabbler's car in custody and subsequently removing the goods from the locked trunk, was for the convenience of Cabbler and for the protection of his property. Indeed, the car was not impounded as evidence but returned to Cabbler within several hours after his arrest when he was let to bail. The property taken from the trunk for its protection was intended to be returned to Cabbler when he was released on bail (T. 210; fifth answer). Thus the type of inven-

tory search in question has been ruled illegal by this Court.

An additional reason a writ of certorari should be granted is that, because of conflicting decisions of lower federal courts and various state courts, guidelines are needed from this Court concerning the admissibility of evidence obtained from such a routine inventory of a car taken by police officers temporarily for its protection while the owner is in police custody. See *People* v. *Norris*, 68 Cal Rep. 582; *People* v. *Cruz*, 296 N. Y. S. 2d 250 (1968); *United States* v. *Lipscomb*, 435 F. 2d 795 (1970); and *People* v. *Robinson*, 9 Cr L. 2218; (evidence admissible). See also; *People* v. *Sullivan*, N. Y. S. 2d 37 (1968); *Mayfield* v. *United States*, 9 Cr L 2215; and *Mozett* v. *Superior Court*, 9 Cr L 2164; (evidence inadmissible). This Court may decide that when a person is arrested while driving a car, the car must necessarily be taken into protective custody and an inventory search of the car is reasonable; or this Court may continue to hold such an inventory search is not reasonable unless state law authorizes the car be held as evidence or as an instrumentality of the crime or authorizes the car be taken as an abandoned or stolen vehicle. See *Chambers* v. *Maroney*, *supra*, at page 49, footnote 7. Even if this Court would permit an inventory search of a car necessarily taken by a police officer when he arrests the driver; it is doubtful that this Court would approve an inventory search of a car when the person arrested was not in the car but simply owned the car which was parked on private property. The argument that when the person is arrested, his car parked on private property would be stranded and subject to being stolen if not taken by the police is similar to the argument that when a person is arrested away from home, his

house is unlocked and subject to being burglarized. In the latter case, the police could not go to the house of the person arrested and lock the doors and at the same time inventory the contents of the house to determine that nothing was stolen during the time the police had assumed the custody of the house.

VII. CONCLUSION

The Supreme Court of Virginia clearly decided the federal question of the search and seizure of an automobile contrary to the decisions of this Court and that decision should be reviewed. Also numerous lower federal courts and various state courts have rendered conflicting decisions concerning this federal question requiring this Court to clarify the issue. Finally Cabbler has received a sentence to the penitentiay for a long term based on a doubtful decision about a principle of law which this Court must review soon, and justice demands a writ of certiorari to review his five judgments of conviction rather than a later review of the principle involved in another case after Cabbler has served all or a part of his sentence.

Respectfully submitted,

HERBERT W. CABBLER
By: John H. Kennett, Jr., his counsel

John H. Kennett, Jr.
133 Kirk Avenue, Southwest
Roanoke, Virginia

Counsel for Petitioner

VIII. PROOF OF SERVICE

I, John H. Kennett, Jr., counsel for the Petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that, on the 24th day of February, 1972, I served a true copy of the foregoing petition for a writ of certiorari on the Respondent, Commonwealth of Virginia, by mailing three copies of same in a duly addressed envelope by first-class mail with postage thereon prepaid addressed to Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia.

JOHN H. KENNETT, JR.

Counsel for Petitioner

IX. APPENDIX

This appendix consists of the five judgments of the Supreme Court of Virginia sought to be reviewed and the single written opinion or decision applicable to them. All were made and entered by the Supreme Court of Virginia on November 29, 1971, and, with this explanation, the court caption and date is omitted at the beginning of each of these six items following in this appendix.

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VII. CONCLUSION

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HERBERT W. CABBLER
By: John H. Kennett, Jr., his counsel

John H. Kennett, Jr.
133 Kirk Avenue, Southwest
Roanoke, Virginia

Counsel for Petitioner

VIII. PROOF OF SERVICE

I, John H. Kennett, Jr., counsel for the Petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that, on the 24th day of February, 1972, I served a true copy of the foregoing petition for a writ of certiorari on the Respondent, Commonwealth of Virginia, by mailing three copies of same in a duly addressed envelope by first-class mail with postage thereon prepaid addressed to Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia.

JOHN H. KENNETT, JR.

Counsel for Petitioner

IX. APPENDIX

This appendix consists of the five judgments of the Supreme Court of Virginia sought to be reviewed and the single written opinion or decision applicable to them. All were made and entered by the Supreme Court of Virginia on November 29, 1971, and, with this explanation, the court caption and date is omitted at the beginning of each of these six items following in this appendix.

Appendix

Book 125, page 693 — record number 7744

Herbert W. Cabbler,

Plaintiff in error,

against Record No. 7744

Commonwealth of Virginia,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Roanoke on the 21st day of February, 1970.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of (Indictment No. 38115). It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said hustings court.

A Copy,

Teste:

Howard G. Turner
Clerk

By *Allen L. Lucy,*
Deputy Clerk

Book 125, page 697 — record number 7745

Herbert W. Cabbler,

Plaintiff in error,

against Record No. 7745

Commonwealth of Virginia,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Roanoke on the 21st day of February, 1970.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel; is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of (Indictment No. 38116). It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said hustings court.

A Copy,

Teste:
Howard G. Turner,
Clerk

By *Allen L. Lucy*,
Deputy Clerk

Book 125, page 696 — record number 7746

Herbert W. Cabbler,

Plaintiff in error,

against Record No. 7746

Commonwealth of Virginia,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Roanoke on the 21st day of February, 1970.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of (Indictment No. 38117). It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said hustings court.

A Copy,

Teste:

Howard G. Taylor,
Clerk

By *Allen L. Lucy*,
Deputy Clerk

Book 125, page 694 — record number 7747

Herbert W. Cabbler,

Plaintiff in error,

against Record No. 7747

Commonwealth of Virginia,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Roanoke on the 21st day of February, 1970.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of (Indictment No. 38118). It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said hustings court.

A Copy,

Teste:

Howard G. Turner,
Clerk

By *Allen L. Lucy*,
Deputy Clerk

Book 125, page 695 — record number 7748

Herbert W. Cabbler,

Plaintiff in error,

against Record No. 7748

Commonwealth of Virginia,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Roanoke on the 21st day of February, 1970.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of (Indictment No. 38119). It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said hustings court.

A Copy,

Teste:

Howard G. Turner,
Clerk

By *Allen L. Lucy*,
Deputy Clerk

Present: All the Justices

HERBERT W. CABBLER

OPINION BY JUSTICE ALEX M. HARMAN, JR.

v. Records No. 7744, 7745, 7746, 7747 and 7748

Richmond, Virginia, November 29, 1971

COMMONWEALTH OF VIRGINIA

FROM THE HUSTINGS COURT OF THE CITY OR ROANOKE

Ernest W. Ballou, Judge

The defendant, Herbert W. Cabbler, appeals from five final orders sentencing him to a total of eleven years in the state penitentiary and fines totaling $1,000.00. Cabbler was convicted on three counts of grand larceny and two counts of petit larceny after a consolidated trial by jury. The jury's finding in each instance was that the larceny was committed by receiving stolen property.

The defendant claims that the trial court erred in three respects. These are: (1) the admission in evidence of stolen goods found in Cabbler's car; (2) the granting of any instructions on receiving stolen property when the Commonwealth elected to rely on the general larceny statutes for conviction; and (3) the granting of other instructions tendered by the Commonwealth setting forth the presumptions which arise from the possession of recently stolen property.

I

The defendant was arrested at approximately 1:30 a. m., on September 2, 1969, at Community Hospital in

Roanoke by Sergeant R. C. Reynolds of the Roanoke Police Department on a felony charge (shooting into an occupied dwelling). The validity of this arrest is not challenged.

Sergeant Reynolds had observed Cabbler enter the hospital after parking his Cadillac automobile. The car was parked in a no parking zone in a private driveway belonging to the hospital in such a manner as to partially block the ambulance driveway leading to the hospital emergency entrance.

After Cabbler's arrest he asked Reynolds to close the windows on his car, which he pointed out to the officer, as it was raining. Reynolds, after closing the car windows, advised Cabbler that the car would be removed from the hospital driveway to the City Garage for safekeeping until Cabbler's release from custody. Cabbler made no complaint to this although he later testified at trial that he had already arranged to have the car "picked up" by one of his employees.

The car, before being stored in the City Garage, was taken to the police property room where the contents of the car were to be removed, inventoried and stored for safekeeping. It was then that the police discovered the stolen goods that resulted in Cabbler's later convictions.

The defendant argues that discovery of the contraband resulted from an unlawful search and seizure and that this evidence should have been suppressed by the trial court.

The Attorney General does not attempt to justify discovery of the stolen goods as a search incident to a

lawful arrest. He says that the action of the police in removing Cabbler's car from the driveway of the hospital to a place of safekeeping and the removal and inventory of the contents of the car were reasonable acts performed under procedures established by the Roanoke Police Department for the protection of property in the possession of a person arrested away from his place of residence.

The evidence discloses that the procedure followed in this case was the result of a long-standing practice and policy of the Roanoke Police Department. One witness testified that this policy was already in effect when he was first employed, more than 28 years earlier, by the department. The policy is that the police, when arresting a person away from his place of residence in possession of property, including automobiles, will take temporary custody of the property for safekeeping unless other immediate means are available to protect such property.

Prior to 1964 or 1965 it was not customary to remove, inventory and separately store the contents of vehicles which came into possession of the police for safekeeping unless the police were specially requested to do so. In 1964 or 1965, however, complaints were made and claims for reimbursement filed by the owners of vehicles who claimed property was lost or stolen while their cars were so stored. The procedure for removal, inventory and separate storage of the contents of vehicles in safekeeping was instituted then in an effort to prevent theft or loss of property from stored vehicles.

It has always been the public policy of the Commonwealth to preserve and protect the individual rights of its citizens. Public policy also dictates that a citizen's rights

in his property shall likewise be preserved and protected. Thus it would appear, and we so hold, that the policy established and the procedure followed by the Roanoke Police Department to protect the property of a citizen arrested away from his home in possession of property where no other immediate means is available for safekeeping of such property are reasonable and in accord with the public policy of the Commonwealth set forth earlier.

The Fourth Amendment does not forbid all searches and seizures but only those that are unreasonable. *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968); *Kirby* v. *Commonwealth*, 209 Va. 806, 167 S. E. 2d 411 (1969). Whether a particular search is unreasonable within the meaning of the Fourth Amendment depends upon the particular facts and circumstances of the case. *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968); *Cooper* v. *California*, 386 U. S. 58, 59 (1967); *Preston* v. *United States*, 376 U. S. 364, 366-67 (1964).

The Fourth Amendment does not preclude the state from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence illegally seized is inadmissible. *Ker* v. *California*, 374 U. S. 23, 34 (1963); *Sibron* v. *New York*, 392 U. S. 40, 60-61 (1968).

Upon the facts before us we hold that the policy established by the Roanoke Police Department and the procedure followed in connection therewith are such

reasonable rules governing arrests as were contemplated in *Ker* and *Sibron*. Such a policy is in accord with the public policy of the Commonwealth, is not violative of the defendant's Fourth Amendment rights and serves the best interest of the property owner by protecting and safeguarding the property in his possession at the time of his arrest.

We therefore find this assignment of the defendant to be without merit.

II

Next we consider the defendant's claim that the trial court erred in instructing the jury on receiving stolen property when the Commonwealth had elected to rely upon the general larceny statutes for conviction.

The five indictments against the defendant charged him with three counts of grand larceny under Code § 18.1-100 and two counts of petit larceny under Code § 18.1-101.

Prior to trial the defendant demanded, as he was entitled under Code § 18.1-109, that the attorney for the Commonwealth advise him of the statute relied on to ask for conviction in each case. He was advised that the Commonwealth elected to rely on the statute as set forth in each of the indictments.[1]

In the trial court the defendant objected to the giving of instructions on receiving stolen property on the ground that the Commonwealth had elected to rely on

[1]The three grand larceny indictments referred specifically to Code § 18.1-100 and both of the petit larceny indictments referred to Code § 18.1-101.

the general larceny statutes and not on Code § 18.1-107 which reads in pertinent part:

> "If any person . . . receive from another person . . . any stolen goods . . . knowing the same to have been stolen; he shall be deemed guilty of larceny thereof . . ."

He argues here, as he did below, that the failure of the Commonwealth to specify Code § 18.1-107 in its election precluded the court from instructing the jury on larceny by receiving stolen goods.

Larceny by receiving stolen goods is a lesser offense which is included in the major one of larceny. *Branch* v. *Commonwealth*, 184 Va. 394, 35 S. E. 2d 593 (1945); see also *Dove* v. *Peyton*, 343 F2d 210 (4th Cir. 1965). The lesser offense is indictable as larceny, *Clark* v. *Commonwealth*, 135 Va. 490, 115 S. E. 704 (1923), and the accused may be convicted of the lesser offense of receiving stolen goods. *Stapleton* v. *Commonwealth*, 140 Va. 475, 124 S. E. 237 (1924).

Thus the Commonwealth's election to proceed against the defendant for the greater offenses under the general larceny statutes did not preclude the giving of instructions on and the conviction of the defendant of the lesser offenses of larceny by receiving stolen property.

III

The defendant's argument that the court erred in the instructions granted explaining the presumptions which arise from possession of recently stolen property is without merit.

Affirmed.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

ANDREW P. MILLER
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Supreme Court of the United States

October Term

No. 71-1020

HERBERT W. CABBLER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the trial court, i.e., defendant and Commonwealth.

REFERENCE TO REPORT OF OPINION

The decision and opinion of the Supreme Court of Virginia, from which the appeal is taken, has now been reported as *Cabbler* v. *Commonwealth*, 212 Va. 529 (1971).

STATEMENT OF THE CASE

The Commonwealth hereby adopts the Statement of the Case and Questions Presented as set out in the defendant's brief.

STATEMENT OF FACTS

The following statement of facts is set out, not necessarily to correct erroneous statements of the defendant, but merely to clarify and amplify the factual situation arising from a lengthy trial.

On the early morning of September 2, 1969, Roanoke police officers were looking for the defendant because they knew that the victim of an alleged felonious shooting into an occupied building was on his way to swear out a warrant for him. The defendant's car was spotted in downtown Roanoke and was followed to the emergency room of the Community Hospital of Roanoke Valley, where the defendant parked it in a "no parking" zone and in a position which partially blocked the entranceway for emergency vehicles at the hospital's emergency room, all of which area is private property in which parking and traffic regulations are made by the hospital management.

The defendant and a passenger in the car alighted and went into the emergency room. Police Sergeant R. C. Reynolds observed a pistol and boxes of ammunition in the back seat and back floorboard of the car and stationed a police officer to guard the car while he, Sgt. Reynolds, went inside the hospital. Sgt. Reynolds called the warrant issuing magistrate on duty and determined that a felony warrant had been issued for the defendant. He then proceeded to arrest the defendant in the hospital emergency room where the passenger was undergoing medical treatment.

It was starting to rain as the defendant and Sgt. Reynolds left the emergency room, and the defendant asked Sgt. Reynolds to roll up his car window, indicating the 1967 Cadillac in which the pistol and ammunition had already been seen. The car keys were removed from the defendant's pocket and then Sgt. Reynolds took him to his police car to wait while the car windows were rolled up.

Sgt. Reynolds went to the defendant's car, closed the windows, removed the pistol and ammunition and stationed another officer to guard the car until he returned. Sgt. Reynolds advised the defendant that his car would be taken to the City Garage and stored there for him until he was able to post bond on the felony charge for which he was being arrested. He then drove the defendant to the Municipal Building to be "booked" and turned him over to the other officers. Sgt. Reynolds was driven back to the Community Hospital where he got in the Cadillac and drove it to police headquarters.

While parked outside the west door of the Municipal Building Sgt. Reynolds opened the trunk of the car with the keys he had taken from the defendant. His intention at that time was not to search for evidence of any crime, but to remove any personal valuables from the car and to store them in the Number Two Property Room, located in the main Municipal Building. Upon seeing a large quantity of clothing in the trunk of the car, Sgt. Reynolds quickly concluded that the Number Two Property Room was too small for his purposes, so he drove the car a block away to a point beside the Municipal Building Annex in which the Police Department's larger, principal property room is located.

There Sgt. Reynolds and several other officers systematically removed and tagged for identification the numerous items of clothing, etc., which constituted the contents of

the trunk of the car. All of this property was guarded until the Property Officer arrived later that morning and was then stored in the main Property Room. Some of this property, which was never claimed by the defendant before the initiation of the instant prosecution, turned out to have been stolen and was introduced at the defendant's trial as evidence against him.

Each of the officers who participated in the guarding and inventorying of the defendant's car testified at the hearing on defendant's motion to suppress the evidence found as a result of this inventory. No one testified that the purpose of the inventory was to "search" for evidence of any crime or to perform any function other than finding, identifying and storing the defendant's valuables for safekeeping while he was in custody and while his car was in the possession of the Police Department. None of these officers heard the defendant protest the police officers' taking temporary custody of his vehicle or offer to have the car moved from its hazardous location by any other means.

The evidence was uncontradicted that the inventory of the defendant's car was conducted purportedly to safeguard the defendant's valuables and was also conducted pursuant to long-standing practices of the Roanoke Police Department. Several officers testified as to the circumstances under which it was their practice to take temporary custody of property such as vehicles belonging to arrested individuals; and numerous illustrations were given. The evidence in this regard can be summarized as follows: (1) whenever a person is arrested away from his home under circumstances in which valuable personal property will be left "stranded" as a result of the actions of the police in making the arrest, and no other measures to safeguard the valuables are apparently available, the police will take into temporary pro-

tective custody such items of personal property, including automobiles, and will store them in an appropriate place pending release of the arrested individual from custody. Because of certain unfortunate instances of theft in the past, police officers have been instructed not to surrender custody of automobiles so "impounded" to personnel at the City Garage until an itemized list of the automobile's contents has been made and such contents have been removed and stored for safekeeping in one of the police property rooms. The original taking into custody of the arrested person's property does not turn on whether the property is located on public or private property at the time of the arrest, so long as the fact of the arrest itself would leave the property unprotected if the police were not to assume custody of it.

There was no evidence that the above-stated policies, which had at least once in the past been reduced to writing and promulgated by the Chief of Police, though such written regulations could not be found, had been applied in this or any other case in a discriminatory manner, nor was there evidence that the officers in the instant case were not acting in a good faith effort to execute such policies. Finally, there was no evidence that the arrest of the defendant was any kind of a "sham" or pretext for "searching" his automobile, or that even the initial taking of the car into custody was done upon such pretext, rather than for the stated purposes of (1) eliminating the emergency traffic hazard posed by the car in its location as parked by the defendant, and (2) the protection of the defendant's own property.

ARGUMENT

As pointed out above, in the statement of facts, the taking into custody of the defendant's vehicle was in no way connected with his arrest for a shooting incident, but was done

in order to remove it from obstructing the entrance to the hospital, and to protect it while defendant was in custody. It was done as a matter of standard operating procedure of the police department, and the police had no intention at any time of trying to use the automobile or its contents as a part of any criminal charges against the defendant.

The same applies to the removal of the goods from the trunk of the car and the placing of them in the police property room. At no time during this procedure did the police have any intention other than the protection of the defendant's property, and it was all done pursuant to long-standing police department policy. Having lawfully taken charge of the defendant's automobile, it was incumbent upon the police to ascertain its contents and to store them safely. To protect themselves, as well as the defendant, they reasonably could and should have made an itemized list of all valuable personal property in the car.

In this case there was no "search" in a constitutional sense, because the police were not looking for evidence of any particular crime. It has been recognized by this Court that every physical intrusion into a citizen's property does not imply a "search" of that property, if that is not the intent of the officer making the entry. *Harris* v. *United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). There the investigating officer discovered evidence against the accused while opening the door of his car in order to protect the car from the rain. While the Court held that this was specifically not a case involving the inventory of the contents of a vehicle, it is still an extremely analogous case because it involves evidence obtained while attempting to protect defendant's property, and not as part of any search. The intent in each situation is very important. As said by the Court in the *Harris* case:

". . . the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances."

It is this important element of intent which distinguishes the instant case from the cases of *Preston* v. *United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964) and *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968). In both of those cases, the officer had seized evidence as a result of an actual search of the automobile, and the officer's motive in each case was to try to find such evidence. In both cases the evidence was held inadmissible because the search was unreasonable in that it could not be upheld as incident to the arrest due to the remoteness of the time and place of the search. The Commonwealth has never asserted in the instant case that the evidence in question was seized as a result of a search incident to an arrest.

Defendant has taken great pains to distinguish the instant case from other similar cases, such as *Harris* v. *United States, supra*; and *Cooper* v. *California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730 (1967), and certainly there are some factual differences. However the reasoning applied by the Court in those two cases, as distinguished from other cases, is the important element, and this reasoning relates to the intent of the persons obtaining the evidence, or the reasons for taking the goods into custody.

Furthermore, it is no answer to say that the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. *Cooper* v. *California*, *supra*.

There have been a number of decisions in other states and lower federal courts that have involved substantially

the same situation as the instant case, with varying results, sometimes turning on small factual technicalities. See *People* v. *Norris*, 68 Cal. Rep. 582; *People* v. *Cruz*, 296 N.Y.S. 2d 250; *U.S.* v. *Lipscomb*, 435 F. 2d 795; and *People* v. *Robinson*, 9 Cr L 2218; (evidence admissible); *People* v. *Sullivan*, 292 N.Y.S. 2d 37; *Mayfield* v. *U.S.*, 9 Cr L 2115; *Mozett* v. *Superior Court*, 9 Cr. L 2164; (evidence inadmissible).

In *People* v. *Robinson*, *supra*, the defendant's automobile was impounded after a lawful arrest. The incriminating evidence, a pistol, was found in the trunk in the course of a routine "inventory search" of the vehicle. The testimony at the hearing indicated that the examination of the auto was conducted pursuant to a police regulation, the purpose of which was to inventory and preserve the property in the vehicle, and that in conducting the examination there was no intention to search for evidence of a crime. The court's reasoning in upholding the admissibility of the evidence is closely akin to the position of the Commonwealth in the instant case, therefore, it will be set out at length:

> "Of course, the existence or non-existence of a police regulation cannot be used as a predicate for determining the issue of the reasonableness of an 'inventory search' of a vehicle (cf. *Cooper* v. *California*, 386 U.S. 58, 61) but in deciding the question we should not reach out to stamp as unconstitutional a procedure which bears every indication of reasonableness. The 'search' of a vehicle which has been lawfully impounded for the purpose of inventorying its contents is calculated to safeguard them for the benefit of their rightful owner as well as to protect the police against possible dishonest claims of misappropriation of the vehicle's contents; and there would seem to be no valid reason for extending the constitutional limitation against 'unreasonable' searches to a fact pattern where the 'search' is not made in defiance of constitutional standards to

obtain incriminating evidence but rather in furtherance of a wholly reasonable and legitimate purpose (*People* v. *Andrews*, 6 Cal. App. 3d 428; *Cooper* v. *California*, *supra*; *State* v. *Wallen*, 185 Neb. 44; *People* v. *Marchese*, 275 Cal. App. 2d 1135).

"The facts here support, if they do not compel, a finding that the 'search' of the defendant's vehicle was made solely for the purpose of compiling an inventory of its contents and that it was not, nor was it intended to be, an exploratory search for evidence. The conclusion here enunciated that items of evidence found in searches of vehicles, lawfully in police custody, when such searches are not made for the purpose of seeking evidence of crime, may not be suppressed is becoming the increasingly accepted view.

"Under the circumstances, therefore, and in the absence of any countervailing appellate authority in this state (but see *People* v. *Sullivan*, 57 Misc. 2d 208, affd. 35 A D 2d 690), I hold that the examination of the defendant's vehicle was not a search for contraband or other evidence of crime but a justifiable routine examination to safeguard its contents and to protect the police department against the possibility of fraudulent claims. Truly, therefore it was not a 'search' in the accepted legal sense but an inventory examination reasonably and properly conducted. What was found on such an examination did not violate the defendant's constitutional privilege against unreasonable search and seizure and should therefore not have been suppressed. The order of suppression should be reversed, on the law and the facts, the defendant's motion denied."

CONCLUSION

For the reasons set out herein, it is submitted that no error was committed by the trial court or by the Virginia Supreme Court, and that the decision of the Virginia Supreme Court is in line with prior decisions of this Court. Therefore, the

Commonwealth prays that certiorari not be granted and that the conviction of the defendant be affirmed.

Respectfully submitted,

ANDREW P. MILLER
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CERTIFICATE OF SERVICE

I hereby certify that on or before the 23rd day of March, 1972, I mailed three copies of this brief to John H. Kennett, Jr., Esquire, 133 Kirk Avenue, Southwest, Roanoke, Virginia 24011, counsel for petitioner.

RENO S. HARP, III
Deputy Attorney General